UNITED STATES DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION
WASHINGTON, DC

In the Matter of: WARBELOW'S AIR VENTURES, INC.
FAA Order No. 2000-3
Docket No. CP97AL0012
Served: February 3, 2000

DECISION AND ORDER[1[1]]

This case involves allegations that Warbelow's Air Ventures, Inc. (Warbelow's), an Alaskan air carrier,[2[2]] operated three of its Piper aircraft in an unairworthy condition – two with an improperly modified fuel pump, and a third with a missing antenna for the emergency locator transmitter (ELT). The law judge found that Warbelow's violated regulations that prohibit operating: (1) unairworthy aircraft;[3[3]] and (2) aircraft with inoperable instruments or equipment, unless certain conditions are met.[4[4]] Although Complainant sought a $20,000 civil penalty, the law judge assessed $5,500.

Both parties have appealed the law judge's initial decision, a copy of which is attached. Warbelow's has appealed the finding of violations, while Complainant has appealed the sanction amount.[5[5]] After considering the record and the briefs, Warbelow's appeal is denied, and a $6,500 civil penalty is assessed.

I. Fuel Pump Flights

[1[1]] The Administrator's civil penalty decisions are available on LEXIS, Westlaw, and other computer databases. They are also available on CD-ROM through Aeroflight Publications. Finally, they can be found in Hawkins's Civil Penalty Cases Digest Service and Clark Boardman Callaghan's Federal Aviation Decisions. For additional information, *see* 65 Fed. Reg. 1654, 1671 (January 11, 2000).

[2[2]] Warbelow's is the holder of a certificate to operate as an air carrier under 14 C.F.R. Part 135.

[3[3]] 14 C.F.R. §§ 91.7(a) provides: "No person may operate a civil aircraft unless it is in an airworthy condition."
14 C.F.R. § 135.25(a)(2) provides: "(a) [N]o certificate holder may operate an aircraft under this part unless that aircraft -- …(2) Is in an airworthy condition and meets the applicable airworthiness requirements of this chapter, including those relating to identification and equipment."

[4[4]] 14 C.F.R. § 135.179(a)(1) provides: "No person may take off an aircraft with inoperable instruments or equipment installed unless the following conditions are met: (1) an approved Minimum Equipment List exists for that aircraft."

[5[5]] Any arguments raised in the parties' briefs not specifically addressed in this decision have been considered, found unworthy of discussion, and rejected.

In 1997, after an incident in which a fuel pump on one of Warbelow's Piper aircraft leaked during flight, FAA inspectors reviewed Warbelow's records to see if there was a general problem with fuel pump maintenance. The FAA inspectors discovered that Warbelow's Director of Maintenance at the time, Scott Rimer, had installed improperly modified fuel pumps on some of Warbelow's Piper Model PA-31 aircraft.[6[6]]

Romec was the manufacturer of the fuel pumps. Romec's fuel pumps for the right and left engines are identical except that they rotate in different directions. The right fuel pump, which rotates clockwise, is Romec Model RG8090-J***4***A. The left fuel pump, which rotates counterclockwise, is Romec Model RG8090-J***7***A. Romec designed the fuel pumps so that their rotation could be reversed.

According to the complaint, in September 1995, Rimer reversed the rotation of a right fuel pump and installed it on a left engine. A further allegation was that in May 1996, Rimer reversed the rotation of a left fuel pump and installed it on a right engine on another aircraft. Rimer testified that although he could not remember modifying the particular fuel pumps identified in the complaint, he did modify a number of fuel pumps before installing them on Warbelow's aircraft.

The Romec manual for the fuel pumps provides: "***Avoid application of excessive torque when tightening valve cover mounting screws. Tighten screws progressively to 29-31 lb.-in. torque.***" (Emphasis added.) Rimer did not have a copy of the Romec manual when he modified the two pumps. He did not know the proper torque values and did not use a torque wrench.[7[7]] It is undisputed that if the screws are not tightened properly, the fuel pumps may leak, resulting in a fire hazard.

[6[6]] It is important to note that the fuel pump that leaked, giving rise to the records review (and the discovery of the alleged improper modification of the fuel pumps) is not at issue in this case because it had not been modified. *See* p. 7 of the law judge's initial decision, where he writes that the FAA's review of Warbelow's records that uncovered the alleged fuel pump violations was in the course of an investigation of an unrelated matter. (Finding of Fact No. 49.) The fuel pumps at issue in the instant case never leaked in service.

[7[7]] Complainant also argues, relying on the testimony of one of its inspectors (1 Tr. 97-98) that Rimer should have tightened the screws in a criss-cross fashion, rather than going around in a circle, but the law judge made no finding to this effect in his initial decision.

Warbelow's operated one of the aircraft identified in the complaint for approximately 706.7 hours[8[8]] and the other for approximately 663.4 hours[9[9]] with the improperly modified fuel pumps. There is no evidence in the record that the pumps leaked after they were modified. When the FAA inspectors found the problem, the fuel pumps were no longer available for inspection. They had already been removed from the aircraft for reasons unrelated to Rimer's reversal of the pumps' rotation. The FAA inspectors only discovered that Rimer was improperly modifying fuel pumps when they investigated a problem that turned out to be unrelated -- i.e., a leak that occurred on a fuel pump that had *not* been modified.[10[10]]

The law judge held, as a factual matter, that Rimer modified the fuel pumps, and that he did so improperly, because he did not comply with the fuel pump maintenance manual and did not use a torque wrench to ensure that the screws were torqued to the proper pressure. The law judge also held, as a matter of law, that Warbelow's was responsible for Rimer's actions.

The law judge found that because nothing in the various documents comprising the engine or aircraft type certificates required the specific fuel pumps at issue (Romec Fuel Pumps Models RG8090-J4A and RG8090-J7A), he could not find that the modified pumps failed to conform to the type certificates, as Complainant had alleged. Nevertheless, the law judge held that the aircraft were unairworthy because the pumps, as improperly modified by Rimer, were not in a condition for safe operation.

A.

On appeal, Warbelow's argues that it should not be held responsible for any errors committed by its former Director of Maintenance. Warbelow's further argues that it had replacement fuel pumps in stock and available to Rimer at all relevant times, and that it maintained on its premises technical materials from which

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[8[8]] From September 19, 1995, through March 25, 1996.

[9[9]] From May 9, 1996, through September 27, 1996.

[10[10]] *See* note 6 above.

Rimer could have obtained the torque values for the screws.[11][11] Its argument seems to be that it did all it could, as a reasonable air carrier, to comply with the regulations.

Even if Warbelow's did indeed supply all the necessary replacement fuel pumps and technical materials to Rimer, Warbelow's is still responsible for Rimer's failure to modify the pumps properly. It is well established that air carriers are responsible for regulatory violations committed by their employees while acting within the scope of their employment. In the Matter of Alika Aviation, FAA Order No. 1999-14 at 13 (December 22, 1999); In the Matter of TWA, FAA Order No. 1999-12 at 8 (October 7, 1999); In the Matter of TWA, FAA Order No. 1998-11 at 26 (June 16, 1998); In the Matter of Horizon Air, FAA Order No. 1996-24 at 5-6, 12 (August 13, 1996); In the Matter of WestAir Commuter Airlines, FAA Order No. 1993-18 at 9 (June 10, 1993); In the Matter of USAir, FAA Order No. 92-48 at 3 (December 21, 1992). Air carriers have a statutory mandate to perform their services with the highest possible standard of care, and their responsibilities are too critical to permit them to transfer their obligations to another. In the Matter of TWA, FAA Order No. 1999-12 at 9 (October 7, 1999) (citing In the Matter of WestAir Commuter Airlines, FAA Order No. 1996-16 at 6-7 (May 3, 1996)). An air carrier's duty of care is non-delegable. In the Matter of TWA, FAA Order No. 1999-12 at 9 (October 7, 1999) (citing In the Matter of USAir, FAA Order No. 1992-70 at 3-4 (December 12, 1992)).[12][12]

Warbelow's claims that Rimer acted beyond the scope of his employment, because Warbelow's parts policy did not include modifying fuel pumps and Warbelow's never told Rimer to modify fuel pumps. This claim, however, lacks persuasiveness. It has been explained that:

> The fact that the servant's act is expressly forbidden by the master, or is done in a manner which he has prohibited, is to be considered in determining what the servant has been hired to do, but it is usually not conclusive, and does not in itself prevent the act from being within the scope of employment. A master cannot escape liability merely by ordering his servant to act carefully. If

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[11][11] Indeed, Warbelow's claims the law judge erred in failing to find specifically that it had on its premises at all relevant times spare fuel pumps and technical guidance containing the correct torque values.

[12][12] Even apart from Warbelow's air carrier status, the owner or operator of an aircraft is primarily responsible for its airworthiness. In the Matter of Pacific Aviation International, FAA Order No. 1997-8 at 5 n.14 (February 20, 1997) (noting that 14 C.F.R. § 91.403(a) provides that "The owner or operator of an aircraft is primarily responsible for maintaining that aircraft in airworthy condition ….").

he could, no doubt few employers would ever be held liable ….

W. PAGE PROSSER ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, § 70, at 502-503 (5th ed. 1984), *quoted in* In the Matter of TWA, FAA Order No. 1998-11 at 27 (June 16, 1998).

The record shows that in modifying the pumps, Rimer believed himself to be acting appropriately to further Warbelow's business of operating aircraft. Rimer, as Warbelow's Director of Maintenance, was authorized to perform repairs on Warbelow's aircraft. In any event, the violation found by the law judge was not that Rimer modified the pumps, but that he modified the pumps improperly. The law judge found that, at least in Alaska, "it is considered 'standard practice' to reverse [Romec fuel pumps]." (Initial Decision at 6, Finding of Fact No. 29.) The law judge stated, "the aircraft and pump manufacturers, in a sense, set up a mechanic to do … precisely what he did do (albeit ineptly). The crux of the [fuel pump] violations comes down to proper execution, not the act itself." (Initial Decision at 21.)

Barring extraordinary circumstances, it is necessary to hold air carriers responsible for violations committed by their employees. As explained previously:

> By holding air carriers responsible for violations committed by their employees, the public is assured that air carriers will do everything in their power to ensure that their employees comply with the security and safety regulations. No one is in a better position to bring pressure to bear on air carrier employees to comply with the regulations than the air carriers themselves.

In the Matter of TWA, FAA Order No. 1999-12 at 10 (October 7, 1999).

Air carriers need to have a strong incentive to remain involved with their operation, to guide and direct their employees. As Complainant points out, narrowly construing "scope of employment" would provide an incentive to air carriers simply to give their employees broad instructions to "do everything right," and then avoid contact with and supervision of the employees. It would not be in the interest of safety to permit an air carrier to avoid liability in a case like this.

B.

Warbelow's argues that the law judge erred in finding airworthiness violations when the evidence only showed that the fuel pumps were *potentially* unsafe. Warbelow's points out that the law judge stated as follows:

> At the time the work was performed, Mr. Rimer did not inform himself of what the torque range should be or use a torque wrench to check the screws' torque values after they were tightened. And it is undisputed that fuel leaks could be a consequence of improperly tightened screws.

(Initial Decision at 14.)

Warbelow's argues that to prove a violation, Complainant needed to prove that the fuel pumps were unsafe *in fact*, which it failed to do. Warbelow's argues that "the fact that the pumps did not leak or fail during hundreds of hours of use is virtually conclusive evidence that the screws were torqued properly …." (Appeal Brief at 43.) As further support for its contention that the fuel pumps were safe, Warbelow's points out that during a deposition, one FAA inspector stated that the fuel pumps were safe. (Indeed, one of Warbelow's claims of error involves the law judge's failure to include as a finding of fact that the inspector originally testified that the fuel pumps were safe.)

Warbelow's is correct that it was Complainant's burden to show that the fuel pumps were not "in condition for safe operation." But the law judge did not err in finding that Complainant had carried its burden.

Warbelow's argues, in essence, that a fuel pump must be considered "safe," as long as it did not actually leak, despite improper maintenance creating the risk of fuel leakage and fire. "Safe" means "free from risk," "secure from threat," and "affording safety from danger." Merriam-Webster's New Collegiate Dictionary. Thus, if the law judge found that fuel leaks *could* have occurred, that was sufficient to show the improperly modified fuel pumps were unsafe. Similarly,

when Warbelow's refers to the improperly modified fuel pumps as only "*potentially* unsafe," it is using a redundant phrase. The term "unsafe" contains within it the idea of potentiality – *i.e.*, potential harm. Warbelow's use of redundancy has the effect of minimizing the violations. Granted, if the fuel pumps had leaked and the engine had caught on fire, this would be a more serious case. But the absence of leaks does *not* mean that the pumps were safe or that no violations occurred.

Although Warbelow's contends that the case law supports its position, it is wrong. Violations have been found in many FAA civil penalty cases where there has been proof only of potential harm. *See*, *e.g.*, In the Matter of Polynesian Airways, FAA Order No. 1994-40 (December 9, 1994) (where the air carrier, in preparing load manifests, had failed to use the most recent figure for the weight of the aircraft, stating that "the potential safety implications from the violations in this case were quite serious, and a stiff penalty is appropriate even though there was no evidence that the weight or center of gravity limits actually were exceeded"); In the Matter of Mayer, FAA Order No. 1997-12 (stating that the law judge gave "too little consideration to the potential safety and security consequences … when an unruly and obstinate passenger's actions call a flight attendant away from [his or] her normal duties"); In the Matter of Continental Airlines, FAA Order No. 1990-19 (in a case imposing civil penalties for the air carrier's failure to detect test objects [objects that look like guns, bombs, and the like that are designed to test the air carrier's security system], stating that "each such failure is evidence of a breakdown in the air carrier's security screening procedures and represents a potential threat to the safety of the traveling public").

Warbelow's also argues that "[t]he law judge erred in failing to make a finding of fact that FAA investigator John Gamble originally testified (in his deposition) that the fuel pumps, as installed, were safe …." (Appeal Brief at 24.) Warbelow's misstates the inspector's deposition testimony and takes it out of context. The inspector did not affirmatively testify that the fuel pumps were safe. Rather, when asked if he had any reason to believe that the pumps were unsafe, he responded no.[13[13]] When read in the context of his entire

[13[13]] Warbelow's relies on the following exchange at the deposition (Respondent's Exhibit 1 at 66-67):

deposition testimony, it is clear that the inspector meant that while the fuel pumps had not leaked, still the FAA had no way of knowing whether the screws were correctly torqued, and therefore, the pumps could not be considered safe.[14[14]] Thus, the law judge did not err in failing to make the finding of fact that Warbelow's proposes.

C.

Warbelow's final argument regarding the fuel pump flights is that Complainant failed to prove, as a factual matter, that Rimer modified the two fuel pumps identified in the complaint. Warbelow's points out that because Rimer could only remember modifying and installing fuel pumps on Warbelow's aircraft generally but could not remember modifying the specific pumps identified in the complaint, the maintenance logs are Complainant's only proof regarding the particular pumps cited in the complaint. Warbelow's faults the FAA inspectors for basing its complaint on fuel pumps that were no longer available for inspection, and argues that it should be given the benefit of the doubt.

Somewhat ironically, given Warbelow's duty to keep accurate and complete maintenance records, Warbelow's argues that its own maintenance logs are not reliable enough to support a

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> Q: … do you have any reason to believe that the other pumps that Scott modified [the pumps identified in the complaint] were unsafe?
> A: No.

[14[14]] The following exchange in the inspector's deposition testimony (Respondent's Exhibit 1 at 67-68) illustrates this point:

> Q: So what evidence we have suggests that they were correctly torqued?
> A: Maybe. I don't know. I have no way of knowing.
> …
> Q: Okay. Now, was there any safety risk to any Warbelow's Air Venture passenger, any member of the public, or any employee of Warbelow's Air Ventures by the operation of the two pumps in the complaint here?
> A: That's an unknown. Obviously, they didn't fail. But there was not a proper procedure performed on them, so that's creating a risk there.

violation.[15][15] For example, Warbelow's argues that Rimer may have inadvertently noted the wrong part numbers in his entries involving installation of the two fuel pumps cited in the complaint. Warbelow's points out that apparently Rimer made an error in listing the part number of one of the pumps he *removed*.[16][16] However, the pumps Rimer *removed* are not the subject of the complaint. Rather, it is the pumps he *installed* that are at issue.

Warbelow's contends that if Rimer made an error in an entry regarding the part number of a fuel pump he removed, then all his other entries, including the part numbers of the fuel pumps he *installed*, are suspect as well. Therefore, Warbelow's argues, the fuel pumps cited in the complaint may not even have been among the fuel pumps Rimer modified. Warbelow's also argues that it is possible that someone already modified the pumps before Warbelow's obtained them.

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[15][15] Warbelow's, as an air carrier, is statutorily required to meet the "highest standard of care in the interest of safety" (49 U.S.C. § 44701(d)(1)(A)). An important part of the care required of an air carrier is keeping accurate and complete maintenance records. The importance of accurate and complete maintenance records cannot be overstated. As a result, it is questionable whether it would be in the interest of either safety or justice to permit Warbelow's to evade responsibility for violations reasonably inferred from its records by claiming the unreliability of the records.

To the extent that Complainant had to draw inferences from the records – to infer from the records that because Rimer indicated he installed a left fuel pump on a right engine he must have modified it – arguably it is because Warbelow's records were not complete enough. When Rimer modified pumps, he failed to state explicitly in the records that he was doing so.

[16][16] For the aircraft bearing registration #N4082T, the maintenance log entry for the right engine (Lycoming Model LTIO-540-JBD) states as follows:

> 5-9-96 Removed fuel pump model RG9080J7A S/N C-9438. TSO 146.9 Hr. Bypass valve sticking. *Installed fuel pump RG9080J**7A** S/N C-7650-D19* 0.0 TSO. Signature Scott Rimer A&P#277469656.

(Complainant's Exhibit 2.)

Concerning the fuel pump Rimer *removed* in the above entry, a J7A fuel pump has the correct rotation for the left engine, whereas the engine at issue was a right engine that required a J4A fuel pump. The evidence also shows that the manufacturer shipped the fuel pump with this serial number [S/N C-9438] as a J4A. Thus, it appears that Rimer may have inadvertently written down that he removed a J7A when he meant to write down that he removed a J4A.

As for the fuel pump Rimer *installed* in the above entry, Romec indicated that it shipped the fuel pump with S/N C-7650-D19 as a J**7**A. A J7A fuel pump has the correct rotation for the left engine, whereas it is undisputed that the engine at issue was a right engine that required a J4A fuel pump. This is the basis for Complainant's allegation that Rimer must have modified the pump.

This is not a criminal case in which the government must prove its case beyond a reasonable doubt. Instead, Complainant is required to prove its case by a "preponderance of the reliable, probative, and substantial evidence." 14 C.F.R. § 13.223. The law judge was persuaded that Complainant met its burden of proving, as a matter of fact, that Rimer modified the two fuel pumps identified in the complaint. A careful review of the record supports the law judge's decision. While the record in this case does not provide absolute certainty regarding the two fuel pumps identified in the complaint, Complainant has met its burden.

Additionally, Warbelow's argues that Rimer's testimony that he improperly modified fuel pumps for Warbelow's and installed them on its aircraft should not be believed because he was a disgruntled employee. This argument is rejected.

A law judge's credibility determinations are entitled to deference on appeal because the law judge was able to observe the witnesses' demeanor at the hearing. *See, e.g.*, In the Matter of Squire, FAA Order No. 1999-6 at 7 (August 31, 1999) (citing In the Matter of General Aviation, FAA Order No. 1998-18 at 15 (October 9, 1998) and In the Matter of TWA, FAA Order No. 1998-11 (June 16, 1998)). Thus, a law judge's credibility determinations will not be overturned lightly.

In the instant case, Warbelow's claims that Rimer lied to retaliate against Warbelow's for demoting Rimer and then firing him. But Warbelow's demoted and fired Rimer *after* Rimer admitted to the FAA inspectors that he had been using an improper method to modify the fuel pumps.

Rimer's admission to the FAA inspectors that he failed to consult the component maintenance manual, which contained the correct torque values,[17[17]] was against his own interest – indeed, it

[17[17]] Respondent's Exhibit 9.

resulted in the FAA's suspension of his mechanic certificate, Warbelow's removal of him from his position as its Director of Maintenance, and later, Warbelow's termination of his employment. Statements against interest are considered more reliable than self-serving statements because people do not tend to fabricate stories that would harm themselves.[18[18]]

The record in this case supports the law judge's credibility determinations rather than calling them into question. As a result, there is no reason to disturb them.

II. Emergency Locator Transmitter Flights

On January 9, 1997, Warbelow's found that the external antenna for the Emergency Locator Transmitter (ELT) was missing on one of its Piper Model PA-31 aircraft. Warbelow's deferred replacement of the antenna under a provision in its Minimum Equipment List (MEL) authorizing it to continue *scheduled* operations with the ELT inoperable for a limited period of time. Warbelow's replaced the antenna on January 14, 1997. A day earlier, however, Warbelow's operated the aircraft on an *unscheduled* roundtrip "medevac" – *i.e.*, medical evacuation – flight between Fairbanks, Alaska and Fort Yukon, Alaska.

On appeal, Warbelow's renews only one of the arguments it made unsuccessfully before the judge. Specifically, it argues that the law judge erred in concluding that the aircraft was unairworthy, given the undisputed evidence that the ELT was able to transmit a signal even without the external antenna.

Deferral of repair under an MEL "strikes a balance between having all equipment in good working order and the air carrier's operational needs." In the Matter of Horizon Air Industries, FAA Order No. 1995-11 (May 10, 1995). By specifying which equipment may be inoperable for a specified period of time while the aircraft continues to be allowed to operate, the MEL sets out acceptable parameters of safety. In the Matter of Emery Worldwide Airlines, FAA Order No. 1997-30 at 15 (October 8, 1997). Without an applicable provision in the

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[18[18]] *See* Rule 804 of the Federal Rules of Evidence, providing an exception to the hearsay rule for statements against interest. A statement against interest is defined in Rule 804(b)(3) as "a statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil … liability … that a reasonable person in the declarant's position would not have made the statement unless believing it to be true."

MEL, if an instrument or piece of equipment is inoperable, then the airworthiness certificate for the aircraft is ineffective. In the Matter of Delta Air Lines, FAA Order No. 1997-21 at 3 (May 28, 1997).

As the law judge pointed out, even though the ELT at issue has a built-in antenna, and the built-in antenna does send out a signal even when the external antenna is missing, still the ELT's signal is not as strong without the external antenna. Thus, the external antenna is not superfluous. The law judge did not err in finding an airworthiness violation.

III. Sanction

Complainant's cross-appeal involves only the amount of the civil penalty.[19[19]] In its written closing argument, Complainant asked the law judge to impose a $20,000 civil penalty, though it did not explain how it divided its proposed penalty between the fuel pump and ELT violations.

The law judge decided $20,000 was too high. Instead, he assessed a civil penalty of $5,500, which he said was $2,500 for each fuel pump violation, and $500 for the ELT violation. The law judge reasoned that the record had not established the fuel pump violations to be exactly what Complainant contended they were. He said that while an "out-and-out type certificate violation might have been one thing," this was a "somewhat strange situation" in which the aircraft and pump manufacturers "set up" the mechanic to modify the fuel pumps, though he did so ineptly. (Initial Decision at 21.) The crux of the fuel pump violations, according to the law judge, was proper execution rather than the act itself. Also, the law judge stated, Warbelow's was unaware, not unlike the FAA, of what *could* be done and *was* being done in its maintenance department. He noted that Warbelow's provided replacement parts for its maintenance department.

[19[19]] Although the law judge rejected Complainant's argument that the fuel pumps were out of conformity with the engine and aircraft type certificates, Complainant states it is not appealing this finding because the law judge found the aircraft unairworthy anyway based on the more serious finding that the fuel pumps were not in condition for safe operation.

The law judge concluded that the ELT violation was relatively insignificant. Indeed, he wrote, the medevac[20[20]] and scheduled route[21[21]] aspects of the flight were compelling reasons for assessing virtually no penalty, and he even thought it possible that the $20,000 sought by Complainant represented solely a fuel pump penalty. Nevertheless, the law judge stated, Warbelow's procedures at the time did not alert its personnel to the impermissibility of deferring repair of the ELT on an unscheduled flight, though Warbelow's had since corrected the problem. The law judge also stressed the need for fully functioning ELTs on unscheduled flights, particularly in Alaska. After weighing all of these considerations, the law judge determined that a $500 civil penalty was appropriate for the ELT violation. The law judge did not address the issue of financial hardship, although Warbelow's had raised it.

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On appeal, Complainant argues that the law judge erred by not assessing a civil penalty for the fuel pump flights according to the Sanction Guidance Table found in FAA Order No. 2150.3A. Complainant argues that the law judge was bound to use the Sanction Guidance Table in determining the sanction, and complains that he did not even mention the Sanction Guidance Table

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[20[20]] The law judge noted, "The flight was in response to an emergency, late in the evening, with some 45 minutes required to get the aircraft off the ground." (Initial Decision at 19.)

[21[21]] Earlier the same day, the aircraft had flown exactly the same route on two scheduled flights. (Initial Decision at 10, Finding of Fact No. 95.) The law judge acknowledged that the need for a fully operating ELT was not the same on the medevac flight at issue as on an ordinary unscheduled flight, since the medevac flight was on a scheduled route, and in case of a crash, it likely could have been found without need for a fully functional ELT. Thus, this was a technical violation. The law judge acknowledged, however, that the regulations cannot be written to anticipate each possible situation, and that Warbelow's had still committed a violation.

in his decision. Complainant also complains that the law judge's decision fails to address the factors stated in 14 C.F.R. § 13.16(a)(4).[22][22]

Complainant's sanction analysis on appeal can be summarized as follows:

- Because Warbelow's is an air carrier, it comes under Section I of the Sanction Guidance Table, which applies to "Air Carriers, Part 125 Operators, and Airport Operators."

- The fuel pump violations represent a "Non-conformity which has an adverse effect (actual or potential) on safe operation" for which the Sanction Guidance Table indicates a maximum civil penalty for each violation. FAA Order No. 2150.3A, Appendix 4, Section I.L.3.

- With more than six aircraft, Warbelow's is a Group III air carrier, and all of the violations occurred prior to January 21, 1997.[23][23] As a result, Complainant argues, the range of a maximum civil penalty per violation is $5,500 to $10,000.

- The law judge mistakenly treated all of the flights on each aircraft as one violation, though each flight constitutes a separate violation.

- The record does not establish the precise number of flights, but it does establish that Warbelow's operated the aircraft for a total of 1370.1 hours with the unsafe fuel pumps, and the average Warbelow's flight is less than one hour. Using a conservative estimate of 1000 unsafe flights, multiplied by a maximum civil penalty per flight of $5,500 to $10,000, leads to a civil penalty of $5.5 to $10 million.

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[22][22] Strictly speaking, Section 13.16(a)(4) is inapplicable to the instant case because it applies only to hazardous materials violations. It provides in relevant part:

> An order assessing civil penalty *for a violation under the Hazardous Materials Transportation Act, or a rule, regulation, or order issued thereunder*, will be issued only after consideration of –
> (i) The nature and circumstances of the violation;
> (ii) The extent and gravity of the violation;
> (iii) The person's degree of culpability;
> (iv) The person's history of prior violations;
> (v) The person's ability to pay the civil penalty;
> (vi) The effect on the person's ability to continue in business;
> (vii) Such other matters as justice may require.

(Emphasis added.)

Nonetheless, as a matter of policy, the FAA has determined that similar criteria should be considered in assessing civil penalties in non-hazardous materials types of cases. In the Matter of Luxemburg, FAA Order No. 1994-18 at 6 (June 22, 1994) (citing In the Matter of Northwest Airlines, FAA Order No. 1990-37 at 12 n.9 (November 7, 1990) and 55 Fed. Reg. 27,548, at 27,569 (1990)).

[23][23] Thus, Warbelow's is exempt from the adjustment for inflation that took effect on January 21, 1997. *See* 14 C.F.R. Part 13, Subpart H (entitled "Civil Monetary Penalty Inflation Adjustment").

- The multi-flight cap must be applied. For a Group III air carrier like Warbelow's, the maximum civil penalty ordinarily imposed would be $50,000. FAA Order No. 2150.3A, Appendix 1, p. 103-8.

- Warbelow's had a violation history.[24[24]]

- Warbelow's presented only unsupported, conclusory assertions regarding its ability to pay, and offered nothing to establish that a $20,000 civil penalty would prevent it from continuing in business.

- Even if one treats the fuel pump flights as only two violations (one per aircraft), the Sanction Guidance Table still calls for a civil penalty in the range of $11,000 to $20,000 (2 violations x $5,500 to $10,000 per violation).

- The absolute minimum for the fuel pump violations is $11,000, while $20,000 is fully warranted.

- There is no reason to choose the low end of the range – rather, the high number of flights and hours militates towards the high end of the range.

Warbelow's counters that:

- Complainant should not be permitted to invoke the Sanction Guidance Table on appeal after having failed to offer it into evidence before the law judge.[25[25]]

- Even if the Sanction Guidance Table were part of the record, the law judge had the authority to assess a civil penalty outside the recommended ranges, based on his judgment and the factors set out in 49 U.S.C. § 46301(e) and 14 C.F.R. § 13.16(a)(4). (Again, Section 13.16(a)(4) is inapplicable because it applies only to hazardous materials violations. For the text of Section 13.16(a)(4), *see* note 22.)

[24[24]] As the law judge noted, Complainant conceded that Warbelow's violation history "is not a significant factor …" (Initial Decision at 21 n.15). The law judge agreed. (*Id*.)

[25[25]] Warbelow's elaborates as follows: "At no time during the hearing, or in any written presentation to the law judge, did the FAA suggest to the law judge that he was bound by the Order and Table. At no time did the FAA introduce into evidence any part of the Order and/or Table, nor did the FAA introduce any testimony from any FAA witness explaining how the Order and Table should be applied. The FAA briefly referred to the Table in its written closing argument (see Complainant's Written Closing Argument at 11), but did not provide a copy of the relevant portions, did not explain how the Table might apply to the alleged violations, and did not even break down the $20,000 lump sum into amounts to which different provisions of the Order and Table might apply. It is not at all surprising that the law judge did not mention either the Order or Table, or discuss whether he felt obliged to apply them." (Reply Brief at 7.)

- The law judge considered the appropriate factors and applied them to the evidence.
- The amount assessed by the law judge is reasonable given all the evidence.
- The Administrator should defer to the law judge's judgment and his intimate familiarity with the record.
- The Administrator cannot go outside the record and therefore cannot apply the Sanction Guidance Table on appeal.

Complainant must justify to the law judge the amount of the civil penalty it seeks. (*See* In the Matter of Luxemburg, FAA Order No. 1994-18 (June 22, 1994), stating that Complainant bore the burden of justifying the amount of the civil penalty it sought and citing 14 C.F.R. § 13.224(a), which provides that, except in the case of an affirmative defense, the burden of proof is on the agency.) Here, Complainant failed to explain to the law judge, either through witnesses or in its written closing argument, exactly how it used its sanction guidance to arrive at a figure of $20,000.

Specifically, Complainant failed to explain to the law judge why, according to the Sanction Guidance Table, the fuel pump violations deserved a maximum civil penalty, or what the minimum, moderate, and maximum ranges of a maximum civil penalty were for an air carrier the size of Warbelow's.[26[26]] Even on appeal, Complainant has not explained why the fuel pump violations represent a "Non-conformity which has an adverse effect (actual or potential) on safe operation," (FAA Order No. 2150.3A, Appendix 4, I.L.3) which ordinarily calls for a maximum civil penalty,

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[26[26]] The ranges for a Group III carrier are as follows:
Maximum $5,500 – $10,000
Moderate $3,000 - $5,500
Minimum $750 - $3,000.
(FAA Order No. 2150.3A, Appendix 1, p. 106.)

rather than a "Non-conformity which may have an adverse effect on safety of operation," (FAA Order No. 2150.3A, Appendix 4, I.L.2), which ordinarily calls for a moderate civil penalty.

Additionally, Complainant did not explain to the law judge that its sanction guidance provides for penalties proportional to the size of an air carrier, or that Warbelow's is a "Group III" carrier, why, and what that means.[27][27] Nor did Complainant explain to the law judge that its sanction guidance provides for a cap on civil penalties for violations involving multiple flights, or tell the law judge what the cap was in this case.

By failing to explain its proposed sanction adequately, Complainant in effect was asking the law judge simply to *trust* Complainant that its proposed sanction was appropriate. On appeal, Complainant may not properly fault the law judge for failing to follow the agency's sanction guidance, when Complainant failed to offer the sanction guidance into the record or to ask the law judge to take judicial notice of it.[28][28]

At the same time, contrary to Warbelow's argument, the Administrator has both the authority and duty to impose the agency's policy on appeal.[29][29] The sanction guidance indicates that the computation should not be done simply by multiplying the sanction for a single violation by the number of flights. FAA Order No. 2150.3A, p. 1. Instead, "judgment should be exercised in determining the seriousness of the violations and applying a sanction that will serve to deter future violations by the violator or others similarly situated: *i.e.*, the totality of the circumstances surrounding the case should be considered …." (*Id.*)

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[27][27] Complainant brought up the fact that Warbelow's is a Group III air carrier in its appeal brief for the first time.

[28][28] Note that ordinarily in the law, parties may not raise new arguments and material for the first time on appeal without showing a good reason for failing to raise them below.

[29][29] *See, e.g.*, In the Matter of [Air Carrier], FAA Order No. 1996-19 (June 4, 1996), stating that "if the law judge does not follow agency policy, the agency may impose that policy by reversing the law judge's decision on appeal (citing Association of Administrative Law Judges v. Heckler, 594 F. Supp. 1132, 1141 (D.D.C. 1984)).

Under the totality of the circumstances, a $3,000 sanction per fuel pump, which is at the low end of the possible penalty ranges, will suffice to deter future violations by Warbelow's and others similarly situated.[30[30]] Thus, a $6,000 civil penalty is assessed for the two fuel pump violations.

Complainant's appeal regarding the sanction involves only the fuel pump violations, so the law judge's assessment of a $500 civil penalty for the ELT violation will not be disturbed.

IV. Conclusion

Warbelow's appeal is denied. Complainant's appeal is granted in part, and a civil penalty of $6,500 is assessed.[31[31]]

JANE F. GARVEY, ADMINISTRATOR
Federal Aviation Administration

Issued this 2nd day of February, 2000.

[30[30]] Warbelow's argues, in defense of the civil penalty assessed by the law judge, that even though the law judge did not expressly mention Warbelow's ability to pay as one of the factors he considered, still the evidence of inability to pay was in the record and it must be assumed that the law judge was aware of it. (Reply Brief at 27.) To support its claim that a $20,000 civil penalty would adversely affect Warbelow's ability to continue in business, Warbelow's offered into evidence a copy of its 1996 corporate income tax return (Respondent's Exhibit 25), as well as the testimony of Mr. Arthur Warbelow's, owner of the company, that the company's net after-tax income in 1997 was likely to be close to zero, and that a $20,000 civil penalty was simply too high. (2 Tr. 349-50.)

In its reply brief, Warbelow's argues that in the absence of contrary evidence, the law judge must assume Mr. Warbelow's testimony to be true. (Reply Brief at 28.) This argument is incorrect. The law judge had the authority to evaluate Mr. Warbelow's demeanor and testimony and find his testimony either credible or not. The law judge's failure to mention inability to pay may indicate that he did not find Warbelow's evidence particularly compelling. It was Warbelow's burden to prove its affirmative defense of financial hardship, and a civil penalty cannot be reduced on the basis of financial hardship without adequate proof. In the Matter of TWA, FAA Order No. 1999-12 at 10 (October 7, 1999) (citing In the Matter of Hampton Air Transport, FAA Order No. 1997-11 at 12). Mr. Warbelow's testimony, as owner of the company, can be considered self-serving. It would have been far more compelling for Warbelow's to introduce the testimony of an independent, unbiased expert witness who could interpret its tax records and explain how the proposed penalty would affect Warbelow's ability to continue in business. *Compare* In the Matter of Blue Ridge Airlines, FAA Order No. 1999-15 at 11 (December 22, 1999), where the testimony of financial hardship came from someone who was in a position to know and who was not only independent, but was, "if anything, hostile to Blue Ridge Airlines."

In any event, this decision assesses a penalty far less than the $20,000 sought by Complainant.

[31[31]] Unless Respondent files a petition for review with a Court of Appeals of the United States within 60 days of service of this decision (under 49 U.S.C. § 46110), this decision shall be considered an order assessing civil penalty. *See* 14 C.F.R. §§ 13.16(b)(4) and 13.233(j)(2) (1999).